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No. 93-48

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. CURTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is immune from criminal prosecution for discharging pollutants into the waters of the United States in violation of Sections 301(a) and 309(c) of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), 1319(c), because he took the actions that led to his conviction in the course of his work as a federal employee.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 988 F.2d 946.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1993. The petition for a writ of certiorari was filed on June 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted on one count of knowingly discharging a pollutant into waters of the United

States in violation of Sections 301(a) and 309(c) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1311(a), 1319(c), and two counts of the lesser included offense of negligently discharging a pollutant. Petitioner was sentenced to concurrent terms of 10 months' imprisonment on each count. The court of appeals affirmed.

1. Petitioner was the Fuels Division Director for Adak Naval Air Station, Alaska, during the fall and winter of 1988-1989. In that capacity, petitioner oversaw the distribution of jet fuel and gasoline from tanks in the base's central storage area. The base's power and steam plants burned jet fuel, which was distributed from the storage area by an underground pipeline. Between October 1988 and February 1989, petitioner directed his subordinates on numerous occasions to pump jet fuel through a pipeline connecting the base's main storage tanks to its steam and electrical generating plants. Petitioner knew that that pumping would result in leakage from an abandoned spur line. The pumping in fact caused jet fuel to leak into the bed of an intermittent stream, to flow into an adjoining creek and from that creek into the Bering Sea. See Pet. App. A3-A4.

2. Petitioner was indicted on five counts (one for each month during which he used the faulty pipeline) of violating the Clean Water Act by knowingly causing fuel to be discharged into waters of the United States without a required permit. See 33 U.S.C. 1342(a)-(c); C.A. App. 13-20. Petitioner moved to dismiss the indictment, arguing that as a federal employee, he was outside the scope of the definition of "person" in Section 502(5), 33 U.S.C. 1362(5), and, therefore, beyond the reach of criminal prosecu-

tion under Section 309(c). The district court denied the motion. Pet. App. A4. After an eight-day jury trial, petitioner was found guilty and sentenced as indicated above.

3. The court of appeals affirmed, rejecting petitioner's claim to immunity from criminal prosecution for offenses committed in the course of his work for the Navy. Pet. App. A1-A11. The court explained that Section 502(5) of the CWA, 33 U.S.C. 1362(5), unambiguously exposes federal employees to criminal liability by defining "person[s]," the subject of the criminal proscriptions in Section 309(c), to include "individual[s]." Pet. App. A6. The court also observed that Section 313(a) of CWA, the only Section to refer to federal employees, expressly protects federal employees acting within the scope of their employment from "any civil penalty [under the CWA] arising from the performance of [their] official duties" (33 U.S.C. 1323(a)), but says nothing of criminal liability. Pet. App. A9-A10.

ARGUMENT

The court of appeals correctly concluded that neither the CWA nor any immunity doctrine protects federal employees from prosecution for criminal violations of federal water pollution controls, and its decision does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

1. Petitioner first argues (Pet. 5-6) that he is not a "person" subject to criminal prosecution under the CWA. The court of appeals correctly rejected this claim. The CWA was enacted in 1972 "to restore and maintain the chemical, physical, and biological

integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that goal, Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in accordance with a permit issued under Section 402 of the Act, 33 U.S.C. 1342. Any "person" who discharges a pollutant into waters of the United States without authorization in a permit is subject to criminal penalties under Section 309(c), 33 U.S.C. 1319(c).

The "person[s]" subject to the criminal enforcement provisions of the CWA are identified in Sections 309(c)(6) and 502(5), 33 U.S.C. 1319(c)(6), 1362(5). Under Section 502(5), the general definition of the term, " 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." [1] The court of appeals therefore was correct in concluding that federal employees —who are quite clearly "individual[s]"—are "person[s]" under the CWA.

Congress's intention to subject federal employees to prosecution for criminal violations of the CWA is

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[1] Section 309(c)(6), 33 U.S.C. 1319(c)(6), adds "responsible corporate officer[s]" to the terms found in the general definition, explicitly authorizing prosecutions of corporate officers who exercise supervisory authority over employees who violate the Act. See *United States* v. *Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991). Other provisions tailor the general definition of "person" to the specific purposes of other Sections of the Act. See 33 U.S.C. 1321(a)(7) (more restrictive definition for purposes of oil and hazardous substance liability); 33 U.S.C. 1322(a)(8) (governmental entities and "individual[s] on board * * * public vessel[s]" omitted from the general definition for purposes of restrictions on marine sanitation devices).

also evident from other provisions of the CWA. Section 313(a), 33 U.S.C. 1323(a), is the only provision of the CWA that expressly mentions federal employees. That Section provides that each federal "department, agency, or instrumentality," and each "officer, agent, or employee thereof * * * shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any non-governmental entity." 33 U.S.C. 1323(a). The obligation to comply extends to "any requirement whether substantive or procedural," notwithstanding "any immunity of such agencies, officers, *agents*, or employees under any law or rule of law." *Ibid.* (emphasis supplied).

Civil enforcement of these requirements against the federal government and its employees is carefully limited. As against the United States, Section 313(a) allows States to obtain "forward-looking orders enjoining future violations," but not "backward-looking penalties for past violations." *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1637 (1992).[2] With respect to federal employees, Section 313(a) bars any enforcement action under the CWA for "any *civil penalty* arising from the performance" of any such

[2] Section 313(a) operates differently with respect to federal agencies and federal employees. For federal agencies, which are not "person[s]" within the meaning of Section 309(c), see *DOE* v. *Ohio*, 112 S. Ct. at 1634-1635, Section 313(a) provides a limited waiver of federal immunity from certain types of enforcement measures, *id.* at 1636-1639. For federal employees, who are "person[s]" within the reach of the general enforcement provisions, Section 313(a) clarifies and limits the liability that would otherwise attach.

employee's "official duties" (emphasis supplied). Absent from this provision is any indication that Congress intended to insulate federal employees from prosecution for *criminal* violations under Section 309(c). In view of the broad exemption from civil liability that Section 313(a) extends to federal employees, an exemption that makes the threat of criminal prosecution especially important to successful enforcement in this context, Congress's failure to provide for criminal immunity should not be regarded as an oversight.

Petitioner nonetheless contends that he is not a "person" under the CWA because "federal agencies, departments, and instrumentalities are not 'persons' within the meaning of § 301(a)." Pet. 5 (quoting *EPA* v. *California*, 426 U.S. 200, 222 n.37 (1976)). But petitioner was indicted, tried and convicted as an individual, not as an agent or instrumentality of the government. The liability of individual employees is not dependent on any liability to which their employers may be subject. Indeed, the fact that Section 502(5) excludes federal agencies from the definition of "person," while including all "individual[s]," with no parallel exclusion for federal employees, reinforces rather than undermines the court of appeals' conclusion that federal employees are "person[s]" subject to criminal liability under the CWA. Because petitioner was properly prosecuted in his individual capacity, his invocation of "sovereign immunity" (Pet. 5) is entirely misplaced. See *United States* v. *Dee*, 912 F.2d 741, 744 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991).[3]

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[3] The doctrine of *official*, as distinct from sovereign, immunity is also inapplicable here. This Court has carefully restricted the circumstances under which official immunity

2. Petitioner also argues (Pet. 7-8) that the CWA's omission of an express statement identifying federal employees as "person[s]," read in conjunction with provisions in other environmental statutes that expressly identify federal employees and "government corporations" as "person[s]," indicates that Congress did not intend that federal employees be treated as

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doctrines may be invoked to defeat criminal prosecutions. See, *e.g.*, *Gravel* v. *United States*, 408 U.S. 606, 624-625, 627 (1972) (Speech or Debate Clause); *United States* v. *Brewster*, 408 U.S. 501, 507-529 (1972) (same). For example, in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), the Court observed that while a state judge would enjoy absolute immunity from civil liability in a civil rights action arising out of his official duties, the absence of immunity from criminal prosecution would furnish an important check against misuse of office. The Court explained that it had "never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." 414 U.S. at 503; see also *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."). Petitioner's claim of immunity is weaker than those already rejected by this Court because he did not occupy a position singled out by the Constitution or common law for special protection from civil suits.

We note that because petitioner was employed by and prosecuted by the Executive Branch of the federal government, this case does not raise issues of federal supremacy, federalism, or separation of powers that have shaped immunity doctrine in other contexts. See, *e.g.*, *In re Neagle*, 135 U.S. 1 (1890) (habeas corpus relief for federal officials held for criminal prosecution under *state* law for actions within the scope of their federal employment); cf. *California* v. *Walters*, 751 F.2d 977, 979 n.1 (9th Cir. 1985) (reserving question of federal officials' exposure to prosecution for state hazardous waste crimes).

"person[s]" subject to prosecution for CWA violations. As the court of appeals correctly noted (Pet. App. 7A), that argument cannot succeed in light of the clear and unambiguous language of the CWA making federal employees subject to federal prosecution. See, *e.g.*, *Greenport Basin & Constr. Co.* v. *United States*, 260 U.S. 512, 516 (1923) (clear statutory language bars argument drawn from the language of other statutes).

In any event, petitioner's *in pari materia* argument fails on its own terms. Comparisons of functionally similar provisions of different statutes can support the type of inference that petitioner advocates only if there are reliable indications that the legislature considered and rejected existing alternative formulations when it devised the provision at issue. See 2B N. Singer, *Sutherland Statutory Construction* § 51.01 at 118 (5th ed. 1992). There is no indication, however, that Congress consulted the definitional provisions cited by the petitioner—Section 2(s) of the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA), 7 U.S.C. 136(s);[4] Section 1004(15) of

[4] Petitioner's reference to FIFRA is especially unhelpful to his argument. The FIFRA definition of "person," like the CWA definition, identifies "individual[s]" as persons without explicitly affirming that federal employees are individuals. Nevertheless, the Act's criminal enforcement provisions expressly exempt "public official[s]" from prosecution for acts undertaken "in the performance of [their] official duties," 7 U.S.C. 136j(b)(3), an exemption that would be superfluous unless federal employees qualified as "persons" under Section 2(s). Thus, if a comparative analysis of FIFRA and the CWA supports any inference concerning federal employees' accountability for criminal violations of the CWA, it is that Congress intended for federal employees to be treated as "individual[s]" within the meaning of Section 502(5) and purpose-

the Resource Conservation and Recovery Act, 42 U.S.C. 6903(15); and Section 302(e) of the Clean Air Act (CAA), 42 U.S.C. 7602(e)—when it devised the definition of "person" found in Section 502(5) of the CWA.

In addition, none of the cited statutes contains a definition of "person" that Congress could have consulted when it devised the definition that became Section 502(5) of the CWA. When Congress enacted Section 502(5), as part of its general revision of federal water pollution control law in 1972, it carried forward, almost verbatim, the definition of "person" set forth in the existing statute. That definition originated in the Water Pollution Control Act Amendments of 1956, ch. 518, § 1, 70 Stat. 505. Since none of the other definitions of "person" cited by petitioner existed in 1956, Congress could not have consulted them when it devised the language that became Section 502(5).[5] Nor, it follows, could Congress have anticipated that courts would rely on comparisons with those provisions in construing the plain terms of the CWA definition. Accordingly, even if petitioner's *in pari materia* analysis were not foreclosed by the plain language of the CWA, it would not support the inference he urges.

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fully chose not to shield them from criminal liability for CWA violations.

[5] A precursor to the current CAA existed as early as 1955. See Act of July 14, 1955, ch. 360, 69 Stat. 322. But the CAA did not include a definition of "person" until 1963, see Clean Air Act Amendments of 1963, Pub. L. No. 88-206, § 9(e), 77 Stat. 400, formerly codified at 42 U.S.C. 1857h(e) (1970), and did not acquire its present definition of the term until 1977, see Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 301(b), 91 Stat. 770, codified at 42 U.S.C. 7602(e).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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